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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

No. 938

LYMAN FLENIKEN, ET AL.,
Petitioners,

versus

GREAT AMERICAN INDEMNITY COMPANY, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF FOR RESPONDENT, GREAT AMERICAN INDEMNITY COMPANY.

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HAUSER PRINTING CO., INC., NEW ORLEANS

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BRIEF FOR RESPONDENT, GREAT AMERICAN INDEMNITY COMPANY.

STATEMENT OF THE CASE

The case is accurately stated in the opinion of the Circuit Court of Appeals for the Fifth Circuit (R. 268-273). It is inaccurately stated in the petition of the petitioners (pages 4 and 5) in the following respects: Robert Neyland, the driver of the automobile involved in the collision with a motorcycle occupied by the petitioners, was employed solely by Garland D. Ewell, the owner of the automobile (R. 223-225). Capital City Press (hereinafter called "the Press") had knowledge that Neyland was employed by Ewell but never consented thereto (R. 179,

180, 198, 199), its consent being unnecessary because of the independent contractor relationship existing between Ewell and the Press. Neyland was not operating the truck under an oral agreement with the Press, the agreement being solely between Ewell and the Press. (R. 177, 197, 225.) Ewell collected from all his customers. The Press collected from none of them (R. 180, 199). Ewell was in complete charge of his route and of the delivery of papers to his customers, and no attempt whatsoever was made by the Press to supervise or direct Ewell, or anyone he might employ, relative to the operation or use of the car or the way in which he should deliver his papers (R. 270, 271; Manship's testimony, R. 124, 125 and Sholar's testimony, R. 92, 96). Neither the time nor the place nor the manner of delivery of papers was subject to control by the Press.

THE ISSUE

The sole issue is whether Ewell was an independent contractor or a servant or agent of the Press.

ARGUMENT

The Circuit Court of Appeals correctly construed Articles 2317 and 2320, Louisiana Revised Civil Code.

An employer is liable for the torts of his servant committed in the discharge of his duties, but for the torts of an independent contractor he is not liable. "Master", "servant" and "independent contractor" are defined in RESTATEMENT OF THE LAW on the subject of AGENCY, page 11, as follows:

> "Sec. 2. Master, Servant; Independent Contractor.

"(1) A master is a principal who employs another to perform service in his affairs and who controls or has the right to control the physical conduct of the other in the performance of the service.

"(2) A servant is a person employed by a master to perform service in his affairs whose physical conduct in the performance of the service is controlled or is subject to the right of control by the master.

"(3) An independent contractor is a person who contracts with another to do something for him but who is not controlled by the other nor subject to the other's right to control with respect to his physical conduct in the performance of the undertaking."

The governing principle is the same in Louisiana. *Robideaux vs. Hebert*, 118 La. 1089, 43 So. 887. In construing this article the Circuit Court of Appeals said:

R. 273, 274, 275

" * * * Appellant insists that the undisputed evidence established as a matter of law that neither Neyland nor Ewell was a servant of the Press for whose acts it was liable, but that Ewell was an independent contractor in respect of work the Press desired done, 'the manner of the doing of which, including the employment, payment and control of the labor, is left (fol. 275) entirely to him'; that he is, therefore, 'an independent contractor for whose acts and omissions in the execution of such contract, the other contracting party is not liable since the doctrine of *respondeat superior* has no application where the employee represents the employer only as to the lawful purpose of the contract but does not represent him in the means by which that purpose is to be accomplished, and the assertion of liability is based on something done or omitted in the use of such means.' *Robi-*

deaux v. Hebert, 43 So. 887. See also in full support: *American National Ins. Co. v. Denke*, 95 S. W. (2) 372; *Marquez v. LeBlanc*, 143 So. 108; *Abate v. Hirdes*, 121 So. 775; *Gall v. Detroit Journal*, 158 N.W. 36; 19 A.L.R. 1164; *Skidmore v. Haggard*, 110 S.W. (2) 726; *Bass v. Kansas City Journal Post*, 148 S.W. (2) 548; *Carter Publications, Inc. v. Davis*, 68 S.W. (2) 640; *Bohanon v. James McClatchy Pub. Co.*, 60 Pac. (2) 510; *American Savings Life Ins. Co. v. Riplinger*, 60 S.W. (2) 115; *National Cash Register Co. v. Rider*, 24 S.W. (2) 28; A.L.I. *Restatement of Law of Agency*, page 11, Secs. 2[2] and 250;[3] *Stockwell v. Morris*, 22 Pac. (2) 189 (fol. 276). **We think it clear that appellant is right.** The principle controlling here is so clearly stated in the *Robideaux* case, *supra*, and so fully supported by the jurisprudence of Louisiana and elsewhere (see the long list of cases cited in the *Denke* case, *supra*, at pages 373-4) that a dissertation from us would serve no useful purpose. Appellees' reliance on the fact that Ewell was listed as an employee is unavailing both because under the terms of the policy and the law as settled in Louisiana, the insurer is not liable unless the insured would be, and because whether Ewell was or was not an employee is not material.

> " * * * If, on the other hand, he was engaged merely, **as the undisputed facts show here he was,** to get something (fol. 277) done which the person employing him wanted done, and the means of performing the work were left to him with no control over physical details as to the manner of performance, whether he is called agent or independent contractor, the person so contracting with him would not be liable for injuries growing out of the use of such means. * * * " (Bold-face type ours.)

The Circuit Court of Appeals was correct in holding the evidence insufficient to make a case for the jury, and it was correct in holding that the District Judge should

have directed verdict in favor of respondent. The rule is stated thus in *Moore's Federal Practice*, Vol. 3, page 3104:

> " * * * a verdict will normally be directed where both the facts and the inferences to be drawn therefrom, as supported by the overwhelming weight of the evidence, point so strongly in favor of one party or the other that the court feels reasonable men could not possibly come to a contrary conclusion."

As authority the text writer cites:

> *North Penn. Railroad v. Commercial Bank*, 123 U.S. 727, 8 S. Ct. 266, 31 L. Ed. 287; *Delaware L. & W. R. Co. v. Converse*, 139 U.S. 469, 11 S. Ct. 569, 35 L. Ed. 213; *Gunning v. Cooley*, 281 U.S. 90, 50 S. Ct. 231, 74 L. Ed. 720; *Gorham v. Mutual Benefit Health & Accident Association*, 114 Fed. (2d) 97 (cert. denied 61 S. Ct. 615).

On page 14 of their brief petitioners state that "Under Section 34 of the Judiciary Act of 1789, the Circuit Court of Appeals was bound to follow the applicable jurisprudence of Louisiana". They cite *Erie Railroad Co. vs. Tompkins*, 304 U.S. 64, 82 L. Ed. 1188; *West vs. American T. & T. Co.*, 311 U.S. 223, 61 S. Ct. 179, 85 L. Ed. 139; *Moore vs. Illinois Central Railroad Co.*, 312 U.S. 630, 85 L. Ed. 1089. It is our interpretation of these decisions that the federal courts are bound to follow the **latest** decision of the **highest** court of the state. This does not mean that they must follow the decision of an intermediate court where that decision conflicts with the decision of the highest court, even though the decision of the intermediate court might be later than that of the highest court. We quote pertinent excerpts from the *West* case:

> "True, as was intimated in the Erie R. Co. case, the highest court of the state is the final arbiter of what is state law. * * *

> " * * * State law is to be applied in the federal as well as the state courts and it is the duty of the former in every case to ascertain from all the available data what the state law is and apply it rather than to prescribe a different rule, however superior it may appear from the viewpoint of 'general law' and however much the state rule may have departed from prior decisions of the federal courts. * * * "

The leading Louisiana case as to what constitutes an independent contractor is *Robideaux vs. Hebert*, 118 La. 1089, 43 So. 887, *supra*, decided by the Louisiana Supreme Court in 1907. In that case the Supreme Court of Louisiana said that Hebert was an independent contractor although the defendant Railroad Company furnished him with a spreader and other equipment and transferred the equipment and laborers to the job, because Hebert was employed to do certain work at a specified price and

> " * * * the manner of its doing, including the employment, payment and control of the labor, was left entirely to him. He was, therefore, an independent contractor, for whose acts in the performance of a lawful contract his employer is not liable, since the doctrine of *respondeat superior* has no application where the employe represents the employer only as to the lawful purpose of the contract, but does not represent him in the means by which that purpose is to be accomplished, and the assertion of liability is based on something done or omitted in the use of such means."

As late as 1941 the Circuit Court of Appeals for the Fifth Circuit, speaking through the late lamented Judge Foster, educated, trained and experienced in the Louisiana Law, said that *Robideaux vs. Hebert*, expressed the law of Louisiana on this subject. *Daroca vs. Metropolitan Life Ins. Co.*, 121 F. (2d) 917.

The leading case in Louisiana involving newspaper carriers is *Abate, et al. vs. Hirdes, et al.*, 9 La. App. 688, 121 So. 775, decided by the Circuit Court of Appeal for Orleans. **The Supreme Court of Louisiana refused a writ of certiorari or review on the ground that "On the facts found by the Court of Appeal the judgment is correct."** (Appendix I.) Hirdes was a carrier for the Item Company. The plaintiff, Abate, who was injured when struck by a car driven by Hirdes while delivering newspapers, sought to hold the Item Company under the doctrine of *respondeat superior*. In holding that Hirdes was an independent contractor, the Court said on page 690 of 9 La. App.:

> "It is said that because The Item Company paid Hirdes a weekly salary, or stipend of $20.00, he became the agent of the company, and it became liable and responsible for all acts done by him within the scope of his employment. We do not believe that the payment of a regular wage, or stipend, or salary, whatever it may be called, renders the payer liable for all of the acts of the receiver. It appears from the evidence that **The Item Company had nothing whatever to do with the operations of the truck. It was owned by Hirdes. He paid for the gasoline and oil and the repairs. He used it in other hauling, or in his private affairs. The only requirements that The Item Company made were two: First, that he deliver no other afternoon paper, and, Second, that he produce satisfactory results in the territory allotted to him. As long as he did this the company had no right to complain as to his method of driving the truck, as to the route taken by him in delivering his papers, as to who should help him in his work, as to whether he should drive the truck himself or employ someone else, or as to any other matters relating to the conduct of his particular end of the business.** (Bold-face type ours.)
>
> " * * * * *

> " * * * In fact, it does not seem that the contract really provided for what may strictly be called salary or wages. Mr. Thompson of The Item Company states that the only reason for the payment of a weekly amount to Hirdes was that the company knew what his living requirements were, and that the territory allotted to him would probably not produce sufficient commissions to afford him a proper living; that it was to the interest of The Item Company to have someone solicit subscriptions and deliver papers in that territory, and that in order to obtain a man of Hirdes' ability, the company had supplemented his commissions by what really was no more than a gratuitous addition to his earnings. * * * Hirdes was nothing more than a distributor; acting independently; purchasing his wares from the manufacturer and selling them to his customers. If the Item Company is liable here, it appears to us that every distributor, every retailer, may by his negligent acts make the wholesaler or manufacturer liable under circumstances over which the manufacturer has no possibility of exercising control or supervision."

The Louisiana Court of Appeal for Orleans said in *Marquez vs. LeBlanc*, 143 So. 108:

> "That the service is in the furtherance of the employer's business is not enough. It must be so far his business as to be his own work and undertaking. The engagement of others to do the work does not affect his responsibility. But when the undertaking is that of the person engaged to do it, and the employer is only concerned in the result, the latter's responsibility fails since the undertaking is not his. * * * "

The Supreme Court of Louisiana also refused a writ in the *Marquez* case. (Appendix II.)

When the Louisiana Supreme Court refuses to issue a writ of certiorari or review in a case decided by one of

the Courts of Appeal and assigns as the reason for refusing the writ that the judgment is correct, it may be said that the Supreme Court affirms, or at least approves, the decision. *Carrere vs. City of New Orleans*, 162 La. 981, 1015, 111 So. 393, 405; *State vs. Ardoin*, 197 La. 877, 890, 2 So. 2d 633, 637. The Louisiana Courts of Appeal consider that where the Louisiana Supreme Court refuses to review a decision of a Louisiana Court of Appeal, it is tantamount to approving it. *Walker vs. George, et al.*, 146 So. 347.

Petitioners rely strongly upon the cases of *Ravare vs. McCormick & Co.*, 166 So. 183, decided by the Louisiana Court of Appeal for the Second Circuit, and *Gallaher vs. Ricketts*, 187 So. 351 (reversed on rehearing 191 So. 713), decided by the Louisiana Court of Appeal for Orleans, and state that "If the case had been tried in the courts of Louisiana (where it would have been tried except for diversity of citizenship), the decisions in the Ravare case and the Gallaher case would have been applied and followed." (Petitioners' brief, page 15.) We disagree. The Court of Appeal for the Fifth Circuit correctly stated that:

> "The Louisiana Court of Appeals cases on which appellees rely, are not in conflict with the settled Louisiana rule. Their facts completely distinguish them from the case at bar." (R. 275).

We submit that this statement is correct. Briefly, the facts in the instant case and in the *Abate*, *Ravare* and *Gallaher* cases are as follows:

THE FLENIKEN CASE

1. Ewell supplied his route and his customers.
2. Ewell furnished the means of transportation, namely, an automobile.

3. Ewell maintained his automobile, buying the gasoline and oil that he used and keeping it in repair.
4. Ewell applied and paid for insurance on his car.
5. Ewell hired his own employees without consulting the Press.
6. Ewell solicited his own customers.
7. Ewell collected from his own customers, kept the money and did not, and was not required to, account for the same.
8. Ewell fixed his own rate for the State Times and Morning Advocate and some of these rates were higher than the published rate of the Press.
9. Ewell was in complete charge of the physical conduct of his business.
10. Ewell was not supervised to any exent by the Press.
11. Ewell delivered bread, cakes and pastry made by Wolf's Bakery, collected articles for dry cleaning for Ideal Laundry on a commission basis, transported copies of the Times-Picayune and Item and transported other articles to his customers.
12. Ewell was not carried on the records of the Press as one of its employees.
13. The Press paid no social security tax for Ewell or for any of his employees.
14. Ewell selected his own means of transportation.
15. Ewell was not required to give bond.
16. Ewell had no regular hours of work.
17. Ewell took holidays at his discretion.

18. The Press did not have a list of Ewell's subscribers and never attempted to ascertain their names.

19. Although the Press furnished to its carriers the names of newcomers to Baton Rouge and its vicinity and furnished extra copies of its newspapers to its carriers, delivery thereof was entirely optional with the carrier.

20. There was no painting, marking or other inscription on Ewell's car showing that he delivered copies of the newspapers.

21. Both Ewell and the Press considered Ewell an independent contractor.

THE ABATE CASE

("Writ refused [by La. Supreme Court.]. On the facts found by the Court of Appeal the judgment is correct." See Appendix I.)

1. Hirdes owned his own truck.

2. Hirdes paid for gasoline and oil consumed by his truck and kept the truck in repair.

3. Hirdes used his truck in hauling other things, and in private affairs.

4. Hirdes truck had the name "Item Tribune" painted on it.

5. The Item Company required that he deliver no other afternoon paper.

6. The Item Company required satisfactory results.

7. The Item Company had no right to complain about his driving.

8. The Item Company could not direct his route.

9. The Item Company could not select his help.

10. The Item Company could not order him or anyone else to drive the truck.

11. The Item Company could not direct him or his employees as to any other matter.

(It is noted that even though Hirdes' truck had the name "Item Tribune" painted on it and that the Item Company prohibited him from delivering any other afternoon paper, neither of which conditions exists in the *Fleniken* case, nevertheless the Louisiana Court of Appeal for Orleans held that Hirdes was an independent contractor. By denying certiorari the Louisiana Supreme Court approved the holding. The facts in the *Fleniken* case are much stronger for respondent than the facts in the *Hirdes* case.)

THE RAVARE CASE

(As stated in the opinion of the La. Court of Appeal, 186 So. 183, 187: "The facts in the case at bar, however, can be readily distinguished from those in the above case [*Abate vs. Hirdes*].")

1. The car driven by Lacombe, the alleged carrier, was actually owned by McCormick & Company, according to the Court's finding.

2. McCormick kept a board listing all Lacombe's customers and agents on his route.

3. Checks and cash were received by McCormick & Company.

4. McCormick & Company provided form notices of expiration for Lacombe to furnish his subscribers.

5. Lacombe delivered to Mrs. Medici in Marksville, Louisiana copies of the Daily Town Talk, which were purchased from McCormick & Company by her and she paid McCormick

& Company direct and not as Lacombe's sub-agent.

6. Various instructions were placed on a bulletin board at McCormick & Company's office for Lacombe's benefit.
7. Lacombe reported to the circulation manager daily "not for instructions" but to turn in money collected. "This is a fact admitted by him, very inconsistent with an independent contractor relationship."
8. Lacombe was obliged to get new customers.
9. Lacombe was obliged to advertise the paper.
10. The circulation manager expected Lacombe to increase circulation in his territory, to deliver his papers in reasonable time and to consult with him.
11. McCormick & Company had "some supervision" over Lacombe.
12. Lacombe's customers could look to McCormick & Company for delivery of papers, "which they gladly did".

(In passing the Court made this very significant and pertinent statement, viz:

> "Independent contractors usually employ subcontractors to help complete their job or perform their tasks." 166 So. 183, 188.

Ewell followed this custom; in fact, at the very moment of the accident Ewell's employee, Neyland, (not the Press' employee) was driving Ewell's automobile.

THE GALLAHER CASE

This case is not authority for the reason that on rehearing the Louisiana Court of Appeal for the Second

Circuit decided that there was no liability because at the time of the accident, Ricketts, who distributed copies of the Times-Picayune, was on his way to attend a "pep" meeting, which he was not required to attend by The Times-Picayune Publishing Company. The reasons for the decision, on rehearing, therefore, have no bearing, but if they did, that case is distinguishable from the instant case for the following reasons:

1. Times-Picayune Publishing Company owned Ricketts' route, whereas Ewell owned his own route.
2. Times-Picayune Publishing Company required a fidelity bond of Ricketts; Capital City Press did not.
3. Times-Picayune Publishing Company conducted classes for Ricketts' benefit; Capital City Press did not.
4. Times-Picayune Publishing Company could supervise Ricketts' work; Capital City Press could not.

Moreover, according to the plaintiff's petition to the Louisiana Supreme Court for a writ of certiorari or review to the Orleans Court of Appeal, at the time of the accident, "Ricketts was going to the office of The Times-Picayune Publishing Company **under orders of The Times-Picayune Publishing Company** * * * " to attend a "pep" or instructional meeting. Subsequently the case was compromised and dismissed on joint motion of the plaintiff and defendant. (Bold-face type ours.)

Hence, it is submitted that the Circuit Court of Appeals for the Fifth Circuit properly distinguished the *Ravare* and the *Gallaher* cases from the *Fleniken* case, and properly followed the rulings of the Louisiana Su-

preme Court in the *Robideaux*, *Abate* and *Marquez* cases. Assuming, *arguendo*, that the *Ravare* and *Gallaher* cases are not distinguishable and are in conflict with the ruling in the *Robideaux*, *Abate* and *Marquez* cases, nevertheless the Circuit Court of Appeals for the Fifth Circuit was obliged to follow the rule enunciated in the last three named cases, being the latest expression of the highest court in Louisiana on the subject. *Erie Railroad Co. vs. Tompkins, supra; West vs. American T. & T. Co., supra; Stoner vs. New York Life Ins. Co.*, 311 U.S. 464, 61 S. Ct. 336, 85 L. Ed. 284.

The decision of the Circuit Court of Appeals below is not in conflict with the decisions of the Fourth, Seventh, Eighth and Ninth Circuit Courts of Appeal

On page 18 of their petition for certiorari petitioners state:

> "5. The Circuit Court of Appeals below rendered a decision in conflict with decisions of the Fourth, Seventh, Eight and Ninth Circuit Courts of Appeals in this: The Fourth, Seventh, Eighth and Ninth Circuit Courts of Appeals have held that, in determining the applicable local law, the most recent pronouncement of the state courts must be accepted by the Federal Courts as declaring the law of the state where coordinate decisions of a state's courts are conflicting or are assumed to conflict. Fourth Circuit: Dayton & Michigan R. Co. v. Commissioner of Internal Revenue, (1940) 112 F. 2d 627, l. c. 630; Seventh Circuit: Alexander v. Missouri State Life Ins. Co., (1933) 68 F. 2d 1, l. c. 3; Eighth Circuit: Yoder v. Nu-Enamel Corporation, (1941) 117 F. 2d 488, l. c. 490; Ninth Circuit: Toole County Irr. Dist. v. Moody (1942) 125 F. 2d 498, l. c. 501."

In every one of these cases the courts recognized that where the highest court of a state has decided a matter, the Federal Court is bound to follow the state court's decision. But it did not hold that where a decision of an intermediate court is in conflict with a decision of the highest court, the decision of the intermediate court, though later than the decision of the highest court, must be followed. Those decisions held that if there were any inconsistency in the opinion of the highest court with respect to rulings on the same subject matter, then the latest opinion must be followed. The question presented in each of the cited cases was whether the latest decision of the highest court was controlling upon the federal courts where there was a conflict between the latest decision and earlier decisions of the same court. The courts in the named circuits held that the federal courts must follow the latest expression of the state court. However, as pointed out above, if there is any conflict between the Louisiana decisions, the latest decision or expression of the Louisiana Supreme Court is controlling. The latest expression of the La. Supreme Court is in connection with the *Robideaux*, *Abate* and *Marquez* cases, *supra.*

On page 26 of their brief petitioners state:

> "The Fifth Circuit Court of Appeals has previously indicated that it did not feel bound by such a doctrine in the case of Sabine Lumber Co. vs. Broderick (1937) 88 F. 2d 586, l. c. 588, where it said, in speaking of a case in which there were conflicting decisions within the state: 'Considering the conflict in the Louisiana jurisprudence, the District Court was entitled to follow the decisions he considered correctly stated the law.' "

Reference to the decision written by the late Judge Foster, a Louisiana lawyer, discloses that there were six decisions of the Louisiana Supreme Court on the question whether a tenant in possession can contest his landlord's title. All these decisions were rendered within a comparatively short period and many about the same time. However, before the case was decided by the Circuit Court of Appeals, the Louisiana Supreme Court decided the question in *Gulf Refining Co. vs. Glassell*, 186 La. 190, 171 So. 846, and the Circuit Court of Appeals followed the latest expression of the La. Suupreme Court. We quote:

> "In a well considered opinion, the Supreme Court of Louisiana comprehensively reviewing and distinguishing the previous jurisprudence, has unequivocally held that a mineral lease giving the right to develop the land and recover the underlying minerals is to be considered the same as a lease of land for agricultural use and subject to the same law. **We feel bound to follow this latest expression of the Louisiana Supreme Court and we are content to do so." (Bold face type ours.)**

That decision is in harmony with *Erie vs. Tompkins*, and other late decisions of this Court.

The petitioners state that the Circuit Court of Appeals below rendered a decision in conflict with the decision of the Tenth Circuit Court of Appeals in the case of *Ryan-Richards, Inc. vs. Whitesides*, 96 F. 2d 826. That decision is easily distinguishable on facts from the facts in the instant case.

That the naming of Ewell in the rider attached to the insurance policy sued upon was not an admission that the relationship of master-servant or principal-

agent existed at the time of the accident was demonstrated in our first supplemental brief filed in the Circuit Court of Appeals, pages 1 to 9, inclusive. We shall not repeat here the arguments urged in support of our contention, nor cite the cases relied upon. It sufficeth to state that the particular endorsement on respondent's policy was the type of endorsement required by the Louisiana Casualty & Rating Bureau on all non-ownership liability policies. The use of the forms approved by the Bureau was obligatory, not voluntary as in the *Ryan-Richards* case. However, regardless of what was stated in the insurance policy, the relationship of independent contractor could not be changed to that of master-servant or principal-agent where the facts proved that the relationship of independent contractor actually existed.

Moreover, if there is a conflict among the circuits as to questions controlled by state law, that of itself is not a reason for granting a writ of certiorari. *Ruhlin vs. New York Life Ins. Co.*, 58 S. Ct. 860, 304 U.S. 202, 82 L. Ed. 1290.

Where the undisputed facts show that the relationship of Independent Contractor exists, the District Court should direct verdict in favor of the defendant who is sued as the alleged master or alleged principal and the Appellate Court is justified in ruling that as a matter of law the respondent insurance company is not liable

In the case of *Venuto v. Robinson* (C.C.A. 3rd Cir.) 118 F. 2d 679, the defendant, who was sued for damages arising out of a collision between two automobiles and a truck operated by one Robinson, contended that there was insufficient evidence to establish that Robinson was its

servant at the time of the accident and on appeal to the Circuit Court of Appeals urged that the District Court had erred in denying its motion for a directed verdict. In upholding the defendant's contention, the Court said:

> " * * * Ordinarily, the problem of determining, upon evidentiary facts whether the relationship between two parties is that of master and servant or employer and independent contractor is one to be answered by the triers of the facts. Restatement, Agency section 220. But here, as in many other places in the law, answers to the fact questions have been crystallized through judicial determination. If facts comparable to those in this case have been crystallized into judicial rule in New Jersey, that rule governs in the federal court. Compare *Stoner v. New York Life Ins. Co.*, 1940, 61 S. Ct. 336, 85 L. Ed. ——.
>
> "The problem then becomes one of fact matching of various decisions to see whether a set of facts under consideration is covered by the adjudicated cases. Obviously, the problem is, in most instances, a matter of judgment for an exact duplication of one piece of litigation by another is never found. But an examination of New Jersey decisions convinces us that, in situations where the facts establishing the independent contractor relationship were weaker than in the instant case, the courts have held the relationship between the parties to be that of employer and independent contractor. * * * No useful purpose would be served in a detailed recital of the facts of these cases which are already set out in the reports. They convince us that upon the facts as presented here New Jersey decisions establish the relationship in this case of Robinson to Ross as that of an independent contractor. It follows, therefore, that the trial court was in error in failing to give the binding instructions on this point requested by the defendant."

As heretofore shown the facts are undisputed and clearly show that Ewell was an independent contractor and not a servant or agent of the Press, and hence as a matter of law, judgment should not and cannot be rendered against respondent, the insurer of the Press, under the doctrine of *respondeat superior*.

Conclusion

In their reasons relied upon for allowance of a writ, petitioners state on pages 12 and 13 of their petition:

> " * * * Your petitioners submit that the Circuit Court of Appeals, consisting of judges unversed and untrained in the learning and application of the Louisiana Civil Code and in the jurisprudence of Louisiana not only substituted their judgment for that of the jury but also rendered a decision contrary to the Louisiana Civil Code and to the applicable jurisprudence of Louisiana; that in so doing, they violated federal rules of law established by the decisions of this Court and of other Circuit Courts of Appeals based upon the statutes and Constitution of the United States. Petitioners request this Court to note that the three circuit court judges who decided his cause are all from states other than Louisiana. Judge Hutcheson, who wrote the opinion, came to the Circuit Court of Appeals from Texas. In the decision of the case at bar, Judge Hutcheson relied heavily upon Texas cases which do not agree with the jurisprudence of Louisiana. Judges Holmes and Sibley who concurred in the judgment are from Mississippi and Georgia, respectively.
>
> "District Judge Adrian J. Caillouet, of Louisiana, who is versed in the theory and application of the Louisiana Civil Code and in the jurisprudence of Louisiana by training and experience, held that a jury case had been made and rendered the judgment based on Louisiana jurisprudence

which was reversed by the Circuit Court of Appeals."

They infer that no judge other than a Louisiana trained judge can correctly decide this case. We do not subscribe to this reasoning. If followed to its logical conclusion, Your Honors, not being trained in the Louisiana law, are not qualified to judge the case, nor is the petitioners' brief writer, a Missouri lawyer, qualified to brief the case.

The Louisiana law on the subject of *respondeat superior* is no different from the law in the common law jurisdictions. The late Judge Foster, who was admitted to the Louisiana Bar many years ago, and who sat upon the United States District Court and later upon the United States Circuit Court of Appeals in the State of Louisiana, was as well qualified as anyone to express an opinion as to the law of Louisiana as regards the doctrine of *respondeat superior*. In 1941, he said *Robideaux vs. Hebert* correctly stated the Louisiana law on this subject (*Daroca vs. Metropolitan Life Ins. Co.*, 121 F. 2d 917). The Louisiana law has not changed since then.

Moreover, in the case of *Robideaux vs. Hebert, supra*, the Louisiana Supreme Court cited common law authorities to support its findings, namely, the case of *Casement v. Brown*, 148 U.S. 615, 13 S. Ct. 672, 37 L. Ed. 582 and *A. & E. Enc. of Law* (2d Ed.). Also in the cases so strenuously relied upon by the petitioners for the writ herein, the courts supported their decisions with statements of the law taken from *Ruling Case Law, Corpus Juris, Cooley on Torts, 2d Thompson on Negligence*, each and all of which are compilations of the common law. In the case of *Marquez v. LeBlanc, supra*, the opinion was written by Judge Higgins, now an Associate Justice on the

Louisiana Supreme Court. He relied altogether on common law decisions and authorities to find that an employer who has no right of control over the details of performance, is not responsible for the negligence of the person undertaking the performance. The cases cited in the opinion are:

McCarthy v. Souther, 83 N.H. 29, 137 A. 445; *Pyyny v. Loose-Wiles Biscuit Co.*, 253 Mass. 574, 149 N.E. 541; *Ramp v. Osborne, et al.*, 115 Or. 672, 239 Pac. 112; *Aldrich v. Tyler Grocery Co.* (1921) 206 Ala. 138, 89 So. 289, 17 A.L.R. 617; *James v. Tobin-Sutton Co.* (1923), 182 Wis. 36, 195 N.W. 848, 29 A.L.R. 457.

For these reasons and for the reasons stated in the original and supplemental briefs filed in the United States Circuit Court of Appeals for the Fifth Circuit, as well as in the respondent's opposition to the plaintiffs' petition for a rehearing, the plaintiffs' petition for certiorari should be denied.

Respectfully submitted,

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